

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

TERRENCE JESSIE,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION,  
and THE SOCIAL SECURITY  
ADMINISTRATION,

Defendants.

Civil No. 07-900-CL

REPORT AND RECOMMENDATION

CLARKE, Magistrate Judge.

Before the court is Defendant's Motion to Dismiss Counts 2 and 3 of Plaintiff's Complaint (#9). Plaintiff did not respond to this motion.

Plaintiff's counsel has filed several cases in this district alleging substantially identical claims to those alleged in this case. Count One alleges a traditional challenge to the agency's

decision denying social security benefits. (Complaint Count One). Count Two is a Freedom of Information Act (FOIA) claim under 5 U.S.C. § 552 alleging that defendants refused to respond to plaintiff's FOIA request regarding information on the number of jobs at issue in step five of the sequential evaluation. (Complaint Count Two). Count Three alleges constitutional claims under the Fifth and Ninth Amendments challenging the agency's reliance on allegedly unreliable vocational expert testimony regarding the number of jobs available in the economy. (Complaint Count Three).

In the other cases, the Commissioner has filed substantially similar motions to the one in this case: to dismiss the FOIA and constitutional claims pursuant to Rule 12(b)(1) and (6). The reasoning set forth in Judge Aiken's May 16, 2007, Opinion and Order granting the motion to dismiss counts 2 and 3 in Romans v. Commissioner, SSA, CV No. 06-1331-AA (#29) has been consistently adopted. See D'Annibale v. Commissioner, SSA, CV No. 06-1202-ST (#34 and #41); Conley v. Commissioner, SSA, CV No. 06-1332-KI (#33); Jaynes v. Commissioner, SSA, CV No. 06-1771-KI (#28); Ellis v. Commissioner, SSA, CV No. 07-209-MO (#23); Randall v. Commissioner, SSA, CV No. 07-37-BR (#26); Howard v. Commissioner, SSA, CV No. 07-365-PK (#18); Couch v. Commissioner, SSA, CV No. 07-575-TC (#13); and Fletcher v. Commissioner, SSA, CV No. 07-429-AS (#19). The defendants' arguments in this case are substantially

similar to those made with regard to the motions to dismiss previously granted in the above cases.

For the reasons set forth in Romans v. Commissioner, SSA, CV No. 06-1331-AA (#29), defendants' motion to dismiss (#9) should be granted. Count two should be dismissed because no records have been withheld from counsel, and thus, the court lacks subject matter jurisdiction. See 5 U.S.C. § 552(a)(4)(B). Count three should be dismissed because plaintiff fails to allege a colorable claim under the Constitution.

#### **RECOMMENDATION**

Based on the foregoing, it is recommended that defendants' motion to dismiss counts two and three (#9) be granted.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. Objections to this Report and Recommendation, if any, are due on December 10, 2007. If objections are filed, any responses to the objections are due 14 days after the objections are filed. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an

order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this \_\_\_\_26\_\_\_\_ day of November, 2007.

\_\_\_\_\_/s/\_\_\_\_\_  
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UNITED STATES MAGISTRATE JUDGE